

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

LIFEWORCS SERVICES, INC.

Employer/Petitioner

and

FEDERATION OF TEACHERS, LOCAL 2326

Union

Case 18-UC-389

DECISION AND ORDER

The Employer/Petitioner seeks to clarify the existing bargaining unit to exclude the position of the Customized Service Coordinator (CSC). Contrary to the Employer, the Union contends that the CSC employees should properly be included in the bargaining unit. I conclude that the CSC employees have been historically excluded from the bargaining unit. Because of the circumstances of this case, I will order that the unit be clarified to exclude the CSC position.

Under Section 3(b) of the Act, I have the authority to decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this case, I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹

¹ The Employer, Lifeworks Services, Inc., is a Minnesota corporation with an office and place of business in Mendota Heights, Minnesota where it is engaged in providing employment and other services to disabled individuals and their families. During the past calendar year, a representative period, the Employer purchased in excess of \$50,000 of materials or services from points located directly outside the

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

EMPLOYER'S OPERATION

The Employer/Petitioner is a non-profit organization whose mission is to support people with disabilities so that they are able to live and work in the community. To that end, the Employer provides two types of services: (1) day training and habilitation services and (2) fiscal intermediary and employer of record service. The day training and habilitation services encompass assisting disabled individuals with finding employment in the community and providing job coaches to assist those who are disabled in the performance of their jobs. In addition to the employment assistance, the Employer also provides center-based services for disabled individuals who do not have work as a goal. The day training and habilitation services are provided by approximately 140 Service Facilitators (SFs) and Service Specialists (SSs).

Through the fiscal intermediary and employer of record services program the Employer assists families and guardians of disabled individuals with respect to budgets, plans, and the employment of individuals to provide direct services for the disabled individuals, or in some situations, to the families of the disabled individuals. Where families choose to hire individuals to provide care or other types of services for the

State of Minnesota. During that same time period, the Employer derived gross revenue in excess of \$250,000 in gross annual revenue.

disabled individuals, the Employer will act as the employer of record. The fiscal intermediary and employer of record services are provided by CSCs, the position at issue herein.

BACKGROUND

In this section I will describe first the existing unit, then the creation of the CSC position and notice to the Union of the creation of the CSC position, and finally, the evidence regarding negotiations for the 2001-2003 and 2003-2005 contracts.

The Current Unit

The parties have had a collective bargaining relationship which has resulted in successive collective bargaining agreements. The parties' current collective bargaining agreement is effective July 1, 2003 to June 30, 2005. The collective bargaining agreement describes the employees covered as:

Employees shall include all Service Specialists (SS's), and Service Facilitators (SF's) and any regular or temporary Employees hired to provide direct training and habilitation services to participants and who work an average of 20 hours or more per week. If any new classifications of Employees providing direct training and habilitation services are created during this contract period, the Employer shall negotiate with the Union for terms and conditions of employment.

Currently, the SFs and SSs are the only employees represented by the Union.

The Creation of the CSC Position and Union Notice

The evidence presented at the hearing indicates that the CSC position was originally proposed around the summer of 2000. The Employer introduced notes from a November 2000 meeting with Union co-presidents Chad Worner and Mike Manaici

where the participants discussed the CSC position. There is little record evidence regarding the meeting, but clearly no agreements concerning CSCs were reached. At the time of the November 2000 meeting, the CSC position had not actually been created.

While the job description for the CSC position was finalized in Spring 2001, a CSC opening was first posted on January 29, 2001. Prior to the January 2001 posting, CSC work had been done exclusively by the Customized Service Director Vicki Gerrits. Administrative secretary Bev Klocek was given the position, which she started on April 1, 2001. In May 2001, an internal newsletter for employees contained an article about the new program and about the CSC position, and it directed employees with questions to Gerrits and Klocek. Sometime during late 2001 and 2002, three additional employees began working as CSCs.

Regarding the Union's knowledge of the CSC position, Union representative Tony Vega testified that he first learned that the CSC position was being filled in January 2003. In its post-hearing brief, the Union acknowledges that the CSC position was created during the 1999-2001 contract period, but contends that the only employee doing the CSC work at that time was Gerrits, a supervisor who would not be claimed by the bargaining unit. The Union further contends that it had no direct knowledge of the hiring of Klocek in April 2001. The Union does, however, acknowledge that bargaining unit members, including the then co-president Worner, applied for the CSC position in January 2001. However, in its post-hearing brief, the Union contends that the CSC position "did not register on the Union's radar screen until the 2001-2003 CBA had been negotiated."

Contract Negotiation

The parties agree that during the negotiations for the 2001-2003 contract, which was effective from July 1, 2001 through June 30, 2003, the CSC position was not discussed. In January 2003, the Union, through co-presidents Mike Maniaci and Sheila Grittner sent the Employer a letter requesting bargaining regarding the CSC position. The letter cited a job posting on January 7, 2003 for a custom support service coordinator as being the impetus for the request.

The Employer, through its president Judy Lysne, responded by email to the Union's request to bargain. She stated in the email:

I received your letter dated January 8th about the Custom Support Services Coordinator. We met about this position with Chad Worner and Mike in November of 2000. It is not a direct service position. The issue was resolved at that time and I do not believe that we need to meet about it again.

The record does not contain evidence of further communications between the parties regarding the CSC position prior to negotiations for the 2003 contract.

Negotiations for the current contract began in May 2003. During the negotiations, the Union proposed including the CSC position in the bargaining unit. The parties were not able to reach an agreement on the issue. The Union dropped the issue from its proposal and indicated that it would file a unit clarification petition. In July 2003, the Union filed a petition with the State of Minnesota Bureau of Mediation Services seeking to add the CSCs to the existing unit. The State decided to hold the petition in abeyance until the Board determined whether it had jurisdiction. On August 15, the Employer filed the instant petition with the Board seeking to exclude the CSC position from the existing unit.

LEGAL ANALYSIS

In Robert Wood Johnson University Hospital, 328 NLRB 912, 914 (1999), the Board repeated its long-standing rule regarding the appropriateness of unit clarification when positions have been historically excluded from the unit:

Unit clarification may be appropriate where an employee classification has been newly created or has undergone recent substantial changes so as to create doubt regarding whether that classification should be accreted to an existing unit. But, unit clarification may not be used to add to a unit an employee classification which historically has been excluded from the unit (citations omitted).

The Board has also stated that its rule requiring the parties to timely address the status of employees in newly created positions stands, even if the result might be instability resulting from the existence of a group of employees who are excluded from the unit, even if they may have interests in common with unit employees. UPS, 303 NLRB 326, 327 (1991).

The record clearly establishes that the CSC position was posted in January 2001 and filled in April 2001, prior to the execution of the parties' 2001-2003 contract. Yet the Union did not seek to discuss the position with the Employer until January 2003 and the parties did not bargain about the issue until May 2003 when they began bargaining for the 2003-2005 contract. Thus, if the Union had notice of the new CSC classification prior to executing the 2001-2003 contract, unit clarification may not be used to add CSCs to the existing unit.

Despite Vega's testimony that he first learned that the CSC position was being filled in January 2003, or the Union's contention that the CSC position "did

not register on the Union's radar screen until the 2001-2003 CBA had been negotiated," I find that the Union had notice of the CSC position prior to executing the 2001-2003 contract. I specifically find that the Union co-presidents are agents of the Union. My reasoning for this determination is based on the following undisputed facts: the Union's January 2003 request to bargain about the CSC posting was signed by the co-presidents, the Employer's response to the Union's request was similarly directed back to the co-presidents, and it appears that the co-presidents sign collective bargaining agreements between the Employer and Union on behalf of the Union.²

Since I have found that the Union had knowledge of the CSC classification prior to executing the 2001-2003 contract, I find that the CSC position has been historically excluded from the unit. While in some circumstances this historical exclusion would result in dismissal of the petition, because the Union has filed a unit clarification petition with the State of Minnesota seeking to include the CSCs in its unit, I am ordering the unit clarified to exclude the CSC position. Ziegler, Inc., 333 NLRB 949 (2001).

ORDER

IT IS HEREBY ORDERED that the bargaining unit exclusively represented by the **Federation of Teachers, Local 2326** be, and hereby is, clarified to specifically exclude Customized Service Coordinators.

² Although the contract in evidence is not signed by the parties, the signature page has only two signature lines under "Lifeworks Federation of Teachers" with "Co-President" under each signature line.

Signed at Minneapolis, Minnesota, this 31st day of October, 2003.

/s/ Ronald M. Sharp

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